



1 pages, largely in Spanish, which ostensibly are supportive of EE's consequential damages  
2 claims. (These documents will hereinafter be referred to as the "2/15/18 consequential  
3 damages documents.") Accutek contends that the 2/15/18 consequential damages  
4 documents should have been produced and/or identified as part of EE's Rule 26(a)(1)(A)  
5 initial disclosures in January 2017 and/or in response to Accutek's discovery requests in  
6 February 2017. Therefore, Accutek contends that, pursuant to Federal Rule of Civil  
7 Procedure 37, "this Court should entertain a terminating sanction dismissing the complaint,  
8 or in the alternative an evidentiary sanction excluding these documents from trial and an  
9 issue sanction precluding [EE] from recovering consequential damages, and awarding  
10 monetary sanctions in connection with this motion." (See ECF No. 52 at 2.) For the  
11 reasons discussed hereafter, the Court recommends that Accutek's request for what would  
12 constitute case dispositive sanctions be denied in its entirety.

13

#### 14 **RELEVANT BACKGROUND**

15 The following background is derived from the Court's review of the declarations  
16 filed by both parties in connection with the motion, including the accompanying exhibits,  
17 and the docket sheet herein.

18 EE served its Rule 26 initial disclosures in this case on January 13, 2017. With  
19 respect to the issue of damages, plaintiff stated: "The amount of [EE's] damages is not  
20 presently calculated with certainty and is subject [to] further clarification and augmentation  
21 based upon results of still ongoing discovery and additional and ongoing consequential and  
22 incidental damages." (ECF No. 52-3 at 9.) Concurrently, EE produced 396 documents  
23 bearing Bates stamps EE000001 to EE000396. (See *id.* at 8-9.)

24 On February 16, 2017, EE served responses to Accutek's first set of interrogatories.  
25 Interrogatory No. 12 posed the following question about damages: "If YOU contend that  
26 YOU are entitled to recover consequential damages in this matter, IDENTIFY all  
27 DOCUMENTS supporting such contention." EE responded: "See Bates Stamp Nos.  
28 EE000001-EE000396." (ECF No. 52-3 at 18-19.) Concurrently, EE served responses to

1 Accutek's first set of Requests for Production. Request No. 5 made the following request:  
2 "If YOU contend that YOU are entitled to recover consequential damages in this matter,  
3 all DOCUMENTS and ELECTRONIC DATA supporting such contention." EE responded  
4 in pertinent part: "See Bates Stamp Nos. EE000001-EE000396." (*Id.* at 30.) Both sets of  
5 discovery responses included the following general objection: "Responding Party objects  
6 to the [Interrogatories] [Requests] to the extent they seek disclosure of proprietary and/or  
7 confidential business information of Responding Party. To the extent the [Interrogatories]  
8 [Requests] do seek such information, Responding Party will respond only pursuant to a  
9 Protective Order under Fed. R. Civ. P. 26(c)." (*Id.* at 13, 27.)

10 According to EE's counsel, Mr. Segura, when he and Accutek's counsel were  
11 engaged in the process of agreeing on a proposed Joint Discovery Plan in November 2016,  
12 well in advance of the initial disclosures, they both perceived the need for the parties to  
13 enter into a Stipulation for Protective Order to safeguard the parties' respective privileged  
14 and confidential information. (See ECF No. 52-4 at 2.) Further, according to EE's counsel,  
15 during the course of his discussions and negotiations with Accutek's counsel, they mutually  
16 agreed that the parties' voluntary disclosures would not include information which either  
17 side deemed confidential. Rather, they mutually agreed that the exchange of the parties'  
18 respective confidential information would take place by and through formal discovery, and  
19 then only after the terms and conditions of a mutually agreeable Stipulated Protective Order  
20 had been worked out, and after the Court had signed and entered such a Discovery  
21 Protective Order. (See *id.* at 3.)

22 EE's counsel's explanation for why EE did not produce any of the 2/15/18  
23 consequential damages documents at the time of the initial disclosures is that during the  
24 course of formulating the Joint Discovery Plan, he and Mr. Malachowski mutually agreed  
25 that EE would provide its damages-related privileged and confidential financial  
26 information to Accutek through the formal discovery process, and then only after EE's  
27 production to Accutek of all of its privileged and confidential corporate financial  
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1 information was actually protected by the terms of a mutually agreed, Court-approved and  
2 entered Discovery Protective Order. (See ECF No. 52-4 at 4.)<sup>1</sup>

3 The Court entered a Discovery Protective Order in this action on March 28, 2017.  
4 (ECF No. 21.) Nearly two months later, on June 21, 2017, Accutek served on EE a notice  
5 of corporate deposition pursuant to Fed. R. Civ. P. 30(b)(6). Five of the specified 28  
6 deposition topics related to EE's alleged damages. (See ECF No. 52-3 at 114-15.) The  
7 deposition notice also included a request for the production of documents and  
8 electronically stored information at the time of the deposition. Five of the 26 specified  
9 requests for production related to EE's alleged damages and thereby sought the confidential  
10 corporate financial information upon which EE based its computation of damages. (See  
11 *id.* at 122.)

12 According to EE, it assigned three supervisors and nine other employees who in turn  
13 devoted 696 hours to the task of gathering documents responsive to the requests for  
14 production included in the corporate deposition notice. The 2/15/18 consequential  
15 documents were the ultimate product of their efforts. (See ECF No. 52-5 at 7-9.)

16 Although the corporate deposition was noticed for July 17, 2017, it did not go  
17 forward on the noticed date due to scheduling issues. (See ECF No. 52-4 at 7-8.)  
18 Accordingly, on July 19, 2017, the parties filed a Joint Motion to extend the discovery cut-  
19 off date to August 25, 2017, for the stated purpose of enabling them to coordinate the  
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21 <sup>1</sup> The Court is mindful that it does not have the benefit of a declaration from Mr.  
22 Malachowski in response to the declaration of Mr. Segura, and that it is conceivable Mr.  
23 Malachowski would dispute Mr. Segura's characterization of what the two of them agreed  
24 to. The Court notes, however, that Mr. Segura's characterization is consistent with the  
25 representations in the parties' Joint Motion for a Protective Order filed on March 10, 2017  
26 that "disclosure and discovery activity in this action are likely to involve production of  
27 confidential, proprietary, or private information for which special protection . . . may be  
28 warranted," that "the documents to be protected include [EE's] corporate financial data  
which is necessary to establish damages," and that the parties were requesting the entry of  
the proposed protective order '[i]n order to permit this discovery to go forward.' (See ECF  
No. 52-4 at 37.)

1 scheduling of the depositions of the five witnesses being designated to testify on behalf of  
2 EE. (See ECF No. 34.) The then-assigned Magistrate Judge granted the Joint Motion on  
3 July 20, 2017. (See ECF No. 35.)

4 On July 26, 2017, Accutek's counsel advised EE's counsel that Accutek was taking  
5 all the depositions of EE's designated witnesses off calendar, and that if the depositions  
6 were rescheduled, it would be close to the new discovery cut-off date of August 25, 2017.  
7 (See ECF No. 52-4 at 51.) However, the August 25, 2017 discovery cut-off date elapsed  
8 without the depositions of EE's corporate designees being rescheduled or renoticed by  
9 Accutek. (See *id.* at 9.) Moreover, while it appears from the Court's review of emails  
10 between counsel that, at one point, Accutek's counsel recommended that all of the parties'  
11 respective depositions be delayed until the week of October 23, 2017 (*see id.* at 11, 53),  
12 Accutek's counsel never provided EE's counsel with any specific dates for the taking of  
13 the depositions of EE's designated witnesses, even after the then-assigned Magistrate  
14 Judge unilaterally extended the discovery cut-off date to November 13, 2017. (See *id.* at  
15 11.) Accordingly, the November 13, 2017 extended discovery cut-off date elapsed without  
16 any re-scheduling of EE's designated witnesses and also without the production by EE of  
17 any of the financial documents requested for production at the corporate deposition. (See  
18 *id.* at 11-12.)

19 On November 16, 2017, after the expiration of the November 13, 2017 extended  
20 discovery cut-off date, the then-assigned Magistrate Judge conducted a Mandatory  
21 Settlement Conference in this matter. As reflected in her Order (ECF No. 40), "it became  
22 apparent to the Court that settlement is impossible at this time based on incomplete  
23 discovery." During the settlement conference, Accutek's counsel requested yet another  
24 extension of the discovery cut-off date to take the depositions of EE's corporate designees  
25 and the depositions of EE's other witnesses. EE's counsel likewise requested additional  
26 time to conduct the depositions of Accutek's witnesses. (See ECF No. 52-4 at 16.) The  
27 Magistrate Judge extended the time for completing the depositions to December 15, 2017.  
28 (See ECF No. 40.)

1 Consistent with the Magistrate Judge's extension of the discovery cut-off date to  
2 December 15, 2017 for the limited purpose of completing depositions, Accutek's  
3 "Amended Notice of Corporate Deposition of Embotteladora Electropura, S.A. de C.V."  
4 did not include any requests for production of documents. (See ECF No. 52-3 at 126-27.)  
5 Nevertheless, EE maintains that it intended to produce to Accutek at the time of the  
6 depositions of its designees all of the 2/15/18 consequential damages documents it had  
7 gathered in response to the document production requests included with the original  
8 corporate deposition notice. (See ECF No. 52-4 at 17-18.) However, for reasons that  
9 Accutek's counsel does not explain in his declaration, the depositions of EE's corporate  
10 designees did not go forward as noticed. (See ECF No. 52-3 at 3.)

11 In fact, none of the depositions of the parties' respective witnesses were ever  
12 coordinated or completed by the extended December 15, 2017 discovery cut-off date. (See  
13 ECF No. 52-4 at 18.) On February 10, 2018, EE filed an "Ex Parte Motion for Modification  
14 of Scheduling Order and Continuance of Pretrial Conference Dates" (see ECF No. 41),  
15 after EE's counsel's was rebuffed in his efforts to get Accutek's counsel to join in a motion  
16 to reopen discovery. (See ECF No. 52-4 at 18-19.) On February 13, 2018, EE's Ex Parte  
17 Motion was denied. (ECF No. 45.) In the face of the denial, EE elected to produce the  
18 2/15/18 consequential damages documents two days later, denominating them in its  
19 counsel's cover email "Plaintiff's Supplemental Responses and document production in  
20 response to your client's Request for Production of Documents." (See ECF No. 52-4 at 20;  
21 ECF No. 52-3 at 134.)

## 22 23 DISCUSSION

24 As a preliminary matter, the Court will address EE's contention that none of the Rule  
25 37 sanctions sought by Accutek are available as a matter of law under the Ninth Circuit's  
26 holding in *Uniguard Security Ins. Co. v. Lakewood Eng. & Mfg. Corp.*, 982 F.2d 363, 367-  
27 68 (9th Cir. 1992). EE is citing *Uniguard* for the proposition the District Court has no  
28 power to impose sanctions pursuant to Rule 37(b)(2) in the absence of a court order

1 compelling compliance with that prior order by the party upon whom the moving party  
2 sought to impose such sanctions. (See ECF No. 52-2 at 5.)

3 However, the *Unigard* decision predated the 1993 amendments to the Federal Rules  
4 of Civil Procedure. Several of those amendments undercut EE's reliance on *Unigard*.  
5 First, the 1993 amendments imposed for the first time the requirement under Rule 26(a)  
6 that certain matters be disclosed without a discovery request. *See Advisory Committee*  
7 *Notes re 1993 Amendment to Rule 26, Subdivision (a)*.

8 The 1993 revision of Rule 37 also included a new subparagraph (c)(1), which  
9 provided a self-executing sanction for the failure to make a disclosure required by Rule  
10 26(a) and also provided the Court with the authority to impose a wide range of other  
11 sanctions on noticed motion, including the severe sanctions listed in Rule 37(b)(2)(A) that  
12 are being sought by Accutek here. *See Advisory Committee Notes re 1993 Amendment to*  
13 *Rule 37, Subdivision (c)*. It is clear from the Advisory Committee's discussion of the  
14 availability of these other sanctions that they do not depend on the existence of a prior court  
15 order:

16 "Preclusion of evidence is not an effective incentive to compel  
17 disclosure of information that, being supportive of the position of the  
18 opposing party, might advantageously be concealed by the disclosing party.  
19 However, the rule provides the court with a wide range of other sanctions—  
20 such as declaring specified facts to be established, preventing contradictory  
21 evidence, or, like spoliation of evidence, allowing the jury to be informed of  
22 the fact of nondisclosure—that, though not self-executing, can be imposed  
23 when found to be warranted after a hearing." *Id.*

24 Further, under the 1993 revision of Rule 37, "evasive or incomplete responses to  
25 disclosures and responses to interrogatories and production requests are treated as failures  
26 to disclose or respond." *See Advisory Committee Notes re 1993 Amendment to Rule 37,*  
27 *Subdivision (a)*.

1        Thus, EE's reliance on *Unigard* is misplaced. Nevertheless, for the reasons  
2 discussed hereafter, the Court does not believe that any sanctions are warranted here.  
3

4        **A. Sanctions under Rule 37(c)(1) are not warranted based on EE's failure**  
5            **to produce the 2/15/18 consequential damages documents at the time of**  
6            **its initial disclosures.**

7        Among the initial disclosure obligations of Rule 26(a)(1)(A) is the obligation to  
8 "make available for inspection and copying as under Rule 34 the documents or other  
9 evidentiary material, unless privileged or protected from disclosure, on which each  
10 [category of damages] computation is based, including materials bearing on the nature and  
11 extent of injuries suffered." It is this obligation that Accutek contends EE violated when  
12 it failed to produce the 2/15/18 consequential damages documents at the time of its initial  
13 disclosures in January 2017.

14        As noted above, according to EE's counsel, Accutek's counsel had agreed well in  
15 advance of the initial disclosures that EE did not have to provide any of its damages-related  
16 privileged and confidential corporate financial information as part of its initial disclosures,  
17 but rather need only provide such information in response to formal discovery requests and  
18 pursuant to the terms of a mutually agreed, Court-approved and entered Discovery  
19 Protective Order. As also noted above, EE's counsel's characterization is consistent with  
20 the representations in the parties' Joint Motion for a Protective Order filed on March 10,  
21 2017 that "disclosure and discovery activity in this action are likely to involve production  
22 of confidential, proprietary, or private information for which special protection . . . may be  
23 warranted," that "the documents to be protected include [EE's] corporate financial data  
24 which is necessary to establish damages," and that the parties were requesting the entry of  
25 the proposed protective order '[i]n order to permit this discovery to go forward.'

26        Moreover, the obligation to produce under Rule 26(a)(1) is qualified by the phrase,  
27 "unless privileged or protected from disclosure." In the Court's view, EE's corporate  
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1 financial records constituted confidential information that EE could reasonably assert were  
2 protected from disclosure in the absence of a protective order.

3 The Court therefore finds that EE did not violate its initial disclosure obligations  
4 when it failed to produce the 2/15/18 consequential damages documents at the time of its  
5 initial disclosures. It follows that no sanctions under Rule 37(c)(1), let alone the case  
6 dispositive sanctions sought by Accutek, are warranted based on that failure.

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8       **B. Sanctions under Rule 37(c)(1) are not warranted based on EE's failure to**  
9       **produce and/or identify the 2/15/18 consequential damages documents in**  
10       **response to Accutek's discovery requests.**

11       Accutek's other contention is that the 2/15/18 consequential damages documents at  
12 least should have been produced or identified in response to Accutek's discovery requests,  
13 and specifically Interrogatory No. 12 and Request for Production No. 5, in February 2017.

14       At the time EE served its responses to Accutek's discovery requests on February 16,  
15 2017, the parties had not yet submitted their Joint Motion for a Protective Order, in which  
16 the parties acknowledged that "the documents to be protected include [EE's] corporate  
17 financial data which is necessary to establish damages." As noted above, both sets of  
18 discovery responses included the following general objection: "Responding Party objects  
19 to the [Interrogatories] [Requests] to the extent they seek disclosure of proprietary and/or  
20 confidential business information of Responding Party. To the extent the [Interrogatories]  
21 [Requests] do seek such information, Responding Party will respond only pursuant to a  
22 Protective Order under Fed. R. Civ. P. 26(c)."

23       The Protective Order was entered by the Court on March 28, 2017. Two days later,  
24 Accutek filed an Ex Parte Motion for Determination of Discovery Dispute, which sought  
25 *inter alia* to compel a further response to Interrogatory No. 1. (See ECF No. 22.) Even  
26 though Accutek clearly was on notice from the statement in the Joint Motion for a  
27 Protective Order and from EE's general objection to both sets of discovery that EE had not  
28 produced or identified responsive documents that supported its consequential damages

1 claims, Accutek did not move to compel a further response to Interrogatory No. 12 or  
2 Request for Production No. 5. Nor did Accutek challenge the above-quoted general  
3 objection.

4 As noted above, when Accutek served its Rule 30(b)(6) deposition notice on June  
5 21, 2017, the deposition notice included a request for the production of documents and  
6 electronically stored information at the time of the corporate deposition. Five of the 26  
7 specified requests for production related to EE's alleged damages and thereby sought the  
8 confidential corporate financial information upon which EE based its computation of  
9 damages. In the Court's view, by renewing its discovery requests after the entry of the  
10 Protective Order for the same discovery relating to EE's damages claims requested by its  
11 Interrogatory No. 12 and Request for Production No. 5, the insufficiency of EE's earlier  
12 responses to those discovery requests, which Accutek had never challenged, became moot.

13 The Court therefore finds that no sanctions under Rule 37(c)(1), let alone the case  
14 dispositive sanctions sought by Accutek, are warranted based on EE's failure to identify  
15 and/or produce the 2/15/18 consequential damages documents in response to Accutek's  
16 discovery requests in February 2017.

## 17 18 CONCLUSION AND RECOMMENDATION

19 EE maintains that it gathered the 2/15/18 consequential damages documents in  
20 response to the Rule 30(b)(6) deposition notice and was prepared to produce them at the  
21 time of the depositions of its designated Rule 30(b)(6) witnesses. If Accutek had proceeded  
22 to take those depositions, instead of repeatedly delaying and ultimately electing not to go  
23 forward with them, it would have received the documents prior to 2/15/18. Alternatively,  
24 if Accutek had simply requested the production of the documents in advance of the Rule  
25 30(b)(6) depositions, which nothing precluded it from doing, it would have received the  
26 documents prior to 2/15/18. Accutek had ample opportunity to obtain the documents it  
27 now asserts it was prejudiced by not receiving earlier.

1        In the Court's view, Accutek 's conduct in ultimately electing to forego taking the  
2 Rule 30(b)(6) depositions and then turning around and taking the position that case  
3 dispositive sanctions should be imposed on EE for not producing the documents EE had  
4 been prepared to produce at the time of the depositions smacks of gamesmanship. The  
5 Court refuses to condone such gamesmanship.

6        For all of the foregoing reasons, this Court **RECOMMENDS** that Accutek's request  
7 for sanctions be denied in its entirety.

8        Any party having objections to the Court's proposed findings and recommendations  
9 shall serve and file specific written objections within 14 days after being served with a  
10 copy of this Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2). The objections  
11 should be captioned "Objections to Report and Recommendation." A party may respond  
12 to the other party's objections within 14 days after being served with a copy of the  
13 objections. *See id.*

14  
15 Dated: April 10, 2018



16  
17 ROBERT N. BLOCK  
18 United States Magistrate Judge  
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